



Built Environment Committee

Corrected oral evidence: The impact of environmental regulations on development

Tuesday 18 April 2023

11.40 am

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Members present: Lord Moylan (The Chair); Lord Berkeley; Lord Best; Lord Carrington of Fulham; Baroness Eaton; Lord Faulkner of Worcester; Lord Goddard of Stockport;; Lord Mawson.

Evidence Session No. 9

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Questions 87 - 95

Witness

I: Justice Brian Preston, Chief Judge of the Land and Environment Court of New South Wales.

Examination of witness

Justice Brian Preston.

The Chair: Welcome to this meeting of the House of Lords Built Environment Select Committee for our evidence session as part of our inquiry into the impact of environmental regulation on development. Our witness today is Justice Brian Preston. Please could Members and witnesses keep their questions and answers brief? I will start with a question from Lord Mawson.

Q87 **Lord Mawson:** Good morning. How does the legal basis for environmental legislation in Australia materially differ from the approach taken by the UK? I am conscious, living on a small island, of the size of Australia. How do you legally control the environment in a country that big when most people live on the coast? How does that work in reality?

Justice Brian Preston: Of course, Australia is a federal system and so we have two tiers of government, with the federal Government and the state or provincial Governments.

The federal Government address matters of national environmental significance and that includes, importantly, the implementation of international conventions such as the World Heritage Convention, the RAMSAR Convention on Wetlands, CITES, the Biodiversity Convention, the UN Framework Convention on Climate Change, and the Paris Agreement.

State Governments can address those matters as well, although we have an inconsistency clause so that the federal legislation would be paramount over the state legislation. They also, importantly, deal with everything else. All the planning legislation is at state level, not at the federal level. An example, which I will come to, is from New South Wales: the Environmental Planning and Assessment Act.

The state planning legislation follows the British model. The planning legislation sets the regulatory approach and the framework. We have planning instruments that are made under that legislation and they implement the legislative framework and set the individualised controls. As I said, in New South Wales, the legislation is the Environmental Planning and Assessment Act and various types of environmental planning instruments are made under that Act.

There are two tiers. One is called the state environmental planning policies and the second is called local environmental plans. Both are a form of delegated legislation. Notwithstanding the words "policies" or "plans" in their titles, they are a form of legislation.

State environmental planning policies address either state-wide or regional issues—issues that cross local council boundaries. An example relates to the regulation of clearing of native vegetation, wetlands or rainforests. Another is the encouragement of particular types of

development; for example, types of housing such as medium- and high-density residential housing, affordable housing, housing for seniors or people with disabilities. Another sets standards, including design and sustainability, for residential apartments or other types of development. Another addresses development in areas that are subject to hazards, such as the coastal zones or areas that are prone to flood or bushfire in Australia. Those are the state policies.

I should say in response to the questions to the previous speakers that we also have legislation that particularly approves state-significant development. That creates a fast-track system for that development so that it does not get bogged down in the local council system.

Local environmental plans apply to each local government area. They are standardised because the state policy says, "These are the things that local environmental plans must address". There are some things the councils do not get a choice about and they have to put these in the plans. But they do have choices about other things and that is what they do.

Local environmental plans do what the typical British planning model does. They set the zoning, whether it is residential, industrial, commercial, rural or whatever it might be. They set the land use table and the three types of development: development permissible without consent, development permissible with consent, and prohibited development. That changes over time. Certain types of residential development are made permissible without consent if they conform to certain controls and standards that are already determined. They just need a certificate that a private certifier can give to say that they conform with those particular standards, and that fast-tracks it. They also set the development standards. For development that is permissible with consent, they set the standards: the height control or the floor space ratio control or whatever it might be.

Additionally, another tier called development control plans provides greater detail than is provided for in the local environmental plans. They are still a form of statutory instrument but there is more flexibility. They must be consistent with the local environment plans and so they fall underneath them and flesh them out.

Consent authorities, when an application is made to obtain consent, must consider all of those tiers of instrument—the state environmental planning policies, the local environmental plans and the development control plans—in determining whether or not to grant consent to a development application. These are mandatory relevant considerations that need to be considered. That is probably sufficient to give you an idea of the planning system.

The Chair: Are consent authorities the local authorities?

Justice Brian Preston: Not necessarily. Now, because we have a tiering, increasingly they have moved away from local councils. At state

government level, we have a different tier. We have the Independent Planning Commission, which determines state-significant developments as well as other types of critical state infrastructure projects such as a rail project or something like that. It will decide those projects and that takes it away from the local councils.

There has been another move. The elected local councillors no longer decide these matters. They go to an independent panel. The panel includes some local council representatives but, otherwise, they are appointed by the state government. People who are experts in planning and planning law sit on those panels. That takes the politics out of determining the merits of a particular application.

The Chair: Was that the purpose of the change?

Justice Brian Preston: Yes. You have local panels and regional panels. The difference is the size of the development. Developments that involve a certain value or cost move up to the regional panel. A city such as Sydney, with 6 million people, straddles local council boundaries. We have eastern, northern and southern panels and they make decisions that are not beholden to the local councils because they cross over boundaries.

The Chair: Lord Faulkner of Worcester, I am afraid, gives his apologies. He has to leave in about 10 minutes.

Q88 **Lord Faulkner of Worcester:** I have time to ask my question. It is great to have you with us this morning. Can I ask you a simple question about the Land and Environment Court of New South Wales, of which you are Chief Judge? What specific challenges gave rise to its creation?

Justice Brian Preston: It was established in 1979 by legislation. It was—and still is—the first environmental specialist superior court of record in the world.

Why was it established? At that time, planning and environmental law in New South Wales was quite primitive and even incoherent. The Government at the time wished to reform the legislation.

The other problem was that the resolution of planning and environmental disputes was dispersed between multiple institutions, not only courts and tribunals but boards and government bodies. If you had one dispute, you could go to six different courts, tribunals or boards. That led to delay, transaction costs, inconsistent decision-making and incoherence in the administration of the legislation. We had both a problem with the legislation and a problem with the way it was being resolved.

Then in 1979 they decided on reform of the legislation. New planning and environmental legislation was introduced, including that Act I have been talking about, the Environmental Planning and Assessment Act, as well as the Heritage Act and a number of other Acts. That introduced a new way, which is now standard fare but was innovative at the time: environmental impact assessments, strategic environmental assessments, and access to

information, public participation and access to the courts—the three pillars that we see from the Aarhus Convention. Standing rules were relaxed and access to the courts was improved. When I say standing rules were relaxed, any person may bring proceedings to remedy or restrain a breach of the law. That comes to the Land and Environment Court.

There was then a desire to rationalise this miscellany of different bodies and bring them into one place or, to use a colloquialism, to create a one-stop shop. They had to decide which place to send it to and decided to set up a specialist court, the Land and Environment Court. They did not have to. They could pick any one of the other courts to get rationalisation, but then we come to the next point, which is specialisation.

There was a belief that we had this new legislation and these new environmental disputes that we were starting to see. Would it not be better to have a body that understands that new legislation and these special types of disputes? You had Professor Liz Fisher come along earlier. She has written articles where she describes environmental and planning disputes as “hot situations”. They are polycentric, uncertain, ever evolving and changing. She talks about the law that regulates these disputes as “hot law” because it also has to keep evolving and changing and keeping up. That poses problems for traditional courts because they are not used to dealing with that sort of problem and that type of law. Having a court constituted by people who understand these types of problems can mean that we can resolve them better and more quickly. Therefore, there was a desire to have rationalisation and specialisation and that led to the establishment of the Land and Environment Court.

For specialisation, they decided that they would constitute the court with two types of decision-makers. One was the judges because we will have legal disputes. The other was the technical experts: planners, architects, engineers, scientists. I will show you later when we come to talk about the dispute resolution processes why it is essential to have that in-house expertise. The consequence has been that we have much speedier resolutions because people understand the issues. If I use the analogy here, as members of the Built Environment Committee, you understand the built environment and those issues. Another committee that knows nothing about it will take a lot longer to try to work out the answers to particular problems. Specialisation improves what you do and how quickly you do it.

The Chair: Are your decisions subject to appeal, presumably, to higher courts?

Justice Brian Preston: Yes.

The Chair: Lord Faulkner, did you want to follow up?

Lord Faulkner of Worcester: That was really clear and I am grateful for that answer.

Q89 **Lord Berkeley:** Justice Preston, you have given us some interesting insights into the courts. I have one question. I heard you mention 1959. Maybe I misheard you. Was it established then? If so, that is several decades before we even thought about it. You can come back to that in your answer.

Justice Brian Preston: It was 1979.

Lord Berkeley: Was it? Right. The question I want to follow up with is: how does it work and what kinds of cases do you have? I am particularly interested in how the technical experts that you have mentioned get involved in the process. That was interesting and we do not have that here.

The Chair: Could I ask a related question, which has struck me, that you might deal with in the same answer? You talk about how your legislation is called "environment and planning". You have a court that deals with land and environment. It all sounds perfectly integrated. What we are discussing here at the heart of this inquiry is what strikes us as a lack of integration and government aspirations for housebuilding and infrastructure development on the one hand and environmental legislation constantly being added to by us in Parliament on the other hand, working against each other. They bog each other down partly in the courts and partly through other decision-making processes. What you describe sounds attractive. Is it really that attractive in the way it works or am I getting an optimistic gloss?

Justice Brian Preston: A rosy picture? The issue you are looking at now was faced by the legislature back in 1979 because it saw this separation of all the different facets into different tribunals, bodies and courts. The idea was to have, to use the colloquialism, a one-stop shop and bring everything together. It has worked.

One of the tests to see why it has worked is that we have been operating for 43 years now and Parliament continues to give more legislation and more jurisdiction to the Land and Environment Court. The proof of the pudding is in the eating and what we are doing.

Also, it is interesting that there is support across all stakeholders in the planning and environmental system: the developers, the residents, the green groups and the government. All the different stakeholders support what we do because of the way we do it. That is important.

Let me give you an idea of what we now have because it gives you an idea of the width of the jurisdiction. We have eight classes of jurisdiction. There is no magic in the word "class". It is just grouping together different types of matters.

Class 1 would be planning appeals, pollution licence appeals and those types of appeals under legislation. In your system, they would go to the Planning Inspectorate, for example. We have that role and so we deal with all of those.

Class 2 used to be building appeals but that has been simplified. They were more things about the health and safety of buildings and those types of matters, and the strata titling issues as well. We also have—this is not a big issue except for the people concerned—tree disputes and hedges. We get those as well.

Class 3 is anything to do with land. That is why it is called the Land and Environment Court. It can grant compensation for compulsory acquisition of land. The big projects—and you mentioned the railway line going up, high speed or something—will require land. People never like the amount of money offered by the Government and there has to be a place to come to challenge that. There is rating and taxing and the land value for that. The indigenous people of Australia, the Aboriginal people, can make a land claim in relation to certain Crown land and we decide that.

The Chair: Do you do rating valuations as well? Are you the rating valuation tribunal?

Justice Brian Preston: Correct, and anything to do with boundaries, property, land title and easements over property. For example, developers may need to get access to adjoining land. If they are going to build a huge building right to the boundary and the neighbour says, “You cannot come on my land”, they come to the court and we give an easement to get access onto the land. That can be a one-stop shop. They can make those applications at the same time as they make applications to get consent. If they do not get consent, they do not need to worry about the easement. If they do, we can give either access to adjoining land or easements for drainage services, gas or whatever it might be as well.

Class 4 is what your High Court does. You have your planning court. It is judicial review and it is also civil enforcement. I said that any person may bring proceedings to remedy or restrain a breach of the law. They come to us and we make a decision whether there has been a breach of the law by the Government, by the private sector or by whoever it might be.

Class 5 is criminal jurisdiction. We also deal with criminal matters. We have original jurisdiction for all the big prosecutions. If you think about all your water utilities, Thames Water and others, getting fined enormous amounts, those prosecutions come to us and we deal with those.

The Chair: Are they criminal prosecutions rather than regulatory penalties?

Justice Brian Preston: Correct.

The Chair: Here, Ofwat would impose a penalty.

Justice Brian Preston: There can be prosecutions as well. There can be both.

The Chair: Do you also have a regulatory penalty regime for such things as water?

Justice Brian Preston: We do in Australia and in New South Wales as well. They can give a penalty infringement notice—

The Chair: But only the criminal ones would come to you?

Justice Brian Preston: Correct. For certain types of offences, they can give a penalty infringement notice. The person who receives that can choose to appeal or not. But they can also commence criminal prosecutions in our court because we can imprison people. We can fine them huge amounts. We can impose a whole range of different penalties.

Classes 6 and 7 are our criminal appellate jurisdiction. Smaller-scale prosecutions can be brought in what you refer to as the magistrates' court. We have the local court. The appeal by either the prosecutor—the Crown—or the defendant comes to our court and so we deal with those.

Class 8 deals with mining. The original Mining Warden's Court was abolished and all that jurisdiction comes to us. Of course, New South Wales is a big mining state. We have all of those.

I gave you that summary because it gives you the huge range of cases that we deal with, but it also gives you insight into how we operate.

We then say we have different people to deal with these different types of disputes. Where do we use them? The judges constitute the court and can hear any matter, but in practice we tend to deal with all the legal matters—the criminal prosecutions, the judicial reviews, civil enforcement and those types of matters.

For the appeals—whether you should grant a development consent or not, like the Planning Inspectorate—we use the commissioners. They are our specialists. We use, first stop, conciliation and, second stop, adjudication. The conciliators can suggest solutions and it can be resolved much more quickly. It is a problem-solving approach. We then do that. That is how, having these experts in-house, I can deploy them to do that.

If the commissioners decide matters, there is an internal appeal on points of law to the judges. The judges will hear an appeal from the commissioners but only on points of law, not on matters of fact.

What types of cases are most common? In terms of the numbers of cases, about two-thirds of our caseload would be in classes 1, 2 and 3—the planning appeals, the pollution appeals and those types of things, as well as those land valuation and compensation types of matters.

The greatest number of cases will be the planning appeals in class 1. Those include appeals against a refusal by whichever consent authority, state or local, to grant development consent or, if consent has been granted, on conditions that are onerous or unsatisfactory. There can be appeals against administrative orders to stop work or do work, all those types of administrative orders that are given by government, including local councils. There can also be appeals against failure particularly by

local councils to issue certificates. If you get your development consent, you need a construction certificate or an occupation certificate. If the local council does not like the development and does a go-slow, there can be an appeal to the court and the court can push that one through.

That gives you an overview of the type of work that we do, if that helps.

The Chair: Lord Berkeley, any more?

Lord Berkeley: Chair, you have covered it. I was interested in the technical experts but Justice Preston has explained what they do, which was interesting. Thank you.

Q90 **The Chair:** Is there any danger of being seen as a judge and jury in your own court?

Justice Brian Preston: In criminal matters?

The Chair: No, I was thinking about the administrative planning side—the equivalent of our Planning Inspectorate, appellate bodies and valuation tribunals.

Justice Brian Preston: I do not believe so. One question was about the advantages of a specialist court. One is that we are an integral component of the overall planning system. One of the failures of other systems has been to separate the Planning Inspectorate or the planning court out from the system. We see ourselves as a vital component of making the planning system work. That leads to public trust and confidence and user satisfaction in the court because we take the view that we want to make the system work and we work within it.

We have no agenda. We decide each matter as it comes before us. But what we do has a value-adding function. When we decide matters, not only do we give our reasons for deciding on a particular dispute one way or another, but those reasons could also articulate principles—ways of looking at a problem and ways of solving a problem—which can be used by others in the planning system.

To give you an example, if you look at our website, you will see certain planning principles, basic things such as view sharing. If you have a development where somebody enjoys a view of Sydney Harbour and somebody else wants a view, how do you share that? There are competing interests. We come up with some principles about the considerations you might take into account and the methodology you might use.

Local government particularly but also state government has found that to be helpful. They have then incorporated what we have said into their development control plans, their local environmental plans and their way of thinking. That is the value-adding. There is a feedback loop. In a sense, we see that we are in partnership with the legislative and executive branches of the Government. We are trying to make this system work. That is the value-adding in coming together.

Q91 **Baroness Eaton:** I have a question and then a supplementary not associated with this question, if you have time afterwards. I have always found dispute resolution an interesting subject in itself. What process does the court use to decide the appropriate dispute resolution method?

Justice Brian Preston: We conceive of ourselves as a multidoor courthouse. Think about this room. Think about the courthouse. There are a couple of doors there and a couple of windows there. Those are our multiple doors. If we have a dispute that comes to the court, we ask how best that dispute should be resolved. We could go out that door and we could use adjudication. We could go out that door and we could use conciliation. That one might be mediation. That one might be neutral evaluation. To use an expression from an American professor, we want to match the forum to the fuss. The forum is the type of dispute resolution process. The fuss is the dispute.

For that to happen, we need to screen and diagnose the dispute as it comes to the centre. We look at the nature of the dispute, the issues involved and who the disputants are. We ask, of the types of dispute resolution processes we have, which one would be most appropriate for that type of dispute.

We facilitate that diagnosis through protocols. We work out over time that certain types of disputes will be appropriately resolved by conciliation first off. We have a protocol that says that this will go to conciliation unless the parties show good reason why it should not. For that to happen, we have to have dispute resolution practitioners who can use all the different facilities. It is no good sending somebody through that door when no one through the door can resolve it that way.

All of our commissioners and our technical experts do the conciliation. Why? Conciliation is similar to mediation in that you use an impartial, independent practitioner to facilitate the negotiation between the parties. It differs from mediation in that the person has subject matter expertise. If I have a land valuation matter or compensation for compulsory acquisition, I want a land valuer. I do not want a scientist. I do not want a planner. I want a land valuer. I have to have that in-house. By contrast, if I have a multistorey residential building in the city, I want an architect, an urban planner, a heritage expert or somebody like that to deal with it. If I have an impact on wetlands or threatened species, I want an ecologist. We refer the matter to a person with subject matter expertise. That person can then proffer solutions. They cannot impose solutions because that is not what conciliation or mediation does but they can offer solutions. They can say, "What if you were to do this? Would that resolve it?" You can get the parties together and they can come up with solutions.

We have this multidoor courthouse offering a variety of dispute resolution processes. We have this mantra of matching the forum to the fuss. Then we refined that, particularly after Covid, to match the form of the forum to the fuss. The form is how we organise or conduct the particular dispute resolution process. Now we are starting to think about where, for

example, we will hold that process. A lot of ours are held out on site. We go to the site of the dispute. We do not do it in a courthouse. That has the advantage of what you see is what you get. Also, you get all the stakeholders being able to do it. We take the court to the people to do it. We do it by way of hybrid means. We might use audio-visual links. We use Microsoft Teams. We use telephone conferencing. We can go online. That is asynchronous but, nevertheless, you can do it online for certain ways. We might mix and match. If this witness cannot attend, that is not a problem. We will take their evidence through AVL or a Microsoft Teams meeting. If this person can attend, we will take it in court. If this person cannot leave home because they have childcare or whatever else, we will go to them and take their evidence there. We mix it up.

We diagnose that early in the piece. We ask the parties. It is like when you check into a hotel and you are asked whether you want this size of room or these facilities. People fill that out and we then adjust to what they need. It is about individualised justice. Rather than people having to dance to the tune of a court, we do the opposite. We say, "It is your court. It is your dispute. What can we do to facilitate its resolution?" That gives a bit of an idea.

Q92 **Baroness Eaton:** Super. Thank you. Quickly, going back to your independent panels for decision-making locally, there is a feeling—perhaps I am wrong but maybe I am not—in this country that that should be part of the democratic process. It is much easier if it is independent. I can see that the process would be smoother. But what is the reaction to people who feel they have not had any local input into that particular planning application?

Justice Brian Preston: It depends where you want to have the local input. Under the delegated legislation, you can have local environment plans or development control plans that can talk about public participation. Indeed, our primary legislation has a code about public participation and how to go about it. That is the opportunity for any person to have their say.

Baroness Eaton: It is incorporated into your thinking?

Justice Brian Preston: It is incorporated, but you do not need to have your local person sitting as the decision-maker.

The Chair: Those of us with a background in local government in the UK—and Lady Eaton, Lord Goddard and I and others possibly share this—have it bred into us that planning decisions need to be taken by people who are elected. I may be wrong about this but I understand that in Ireland that is no longer the case and the elected county councillors no longer participate in planning application decisions. We would find it quite a difficult pill to swallow here. Anyway, that is what Lady Eaton was getting at. Can we move on to Lord Goddard of Stockport?

Lord Goddard of Stockport: I have a similar question. It is an excellent system because it cuts through the politics, but how do you get rid of a judge? Those people are there to—

The Chair: You can get rid of councillors, you see.

Lord Goddard of Stockport: We are elected. We stand. The people vote for us. We make decisions. That is the deal. When you remove that and put something else in its place, where is the accountability for that in the hierarchy? I presume you are appointed by the federal Government. Is there a time limit on how long you serve? How does it operate?

Justice Brian Preston: For judges, there is a time limit in the sense that we have a statutory retirement age, but otherwise we can be removed only by a vote of both Houses of Parliament. Commissioners have a seven-year term. They can apply to be renewed and many are renewed, but it is a seven-year term. It is a government appointment. It is a statutory appointment.

It is important that we are not the first-instance decision-maker. That is important. The first-instance decision-maker is either at the local government or at the state government level. Many different models have been gone through. The first planning regime came in about 1946 in Australia and we have gone through many different models. Interestingly, the Land and Environment Court was established in response to the unhappiness and dissatisfaction with a previous model, the planning appeals model, which had councillors on it. There was a lot of dissatisfaction with the politicisation of decision-making by local councils.

Under the new system where it has gone to these panels, there are representatives of the local councils, but the decision of the panel is deemed to be the decision of the local council or the decision of the Independent Planning Commission is deemed to be the decision of the Minister. But they have input into it. The planners who work for the council write the reports. The state government's department of planning officials write the reports. They do get that input into it. If there is an appeal from the decision, the litigant becomes the local council and so the local council then gets to give the instructions as to how to conduct the appeal in the court.

It is not totally removed. The council still has input into the system. But the feeling has been that, hard though it is for the councillors to feel unloved and be removed from the process, all other stakeholders find it better to do it because it does depoliticise it but there is still input.

Q93 **Lord Best:** Justice Preston, you have already advocated brilliantly for this whole system. I will not quiz you on the additional advantages: the one-stop shop, the use of experts, the absence of political judgments that might have messed things up. It is all great.

I will turn it around the other way. What are the disadvantages of the way that you do things? What do you think ought to be changed in Australia?

The Chair: Can I supplement that with a related question? You have described a process that is, in a sense, designed to make everyone happy and succeeds brilliantly in making everyone happy—or less discontented than they might otherwise be. But our issue is not just happiness. Our issue is the speed of development, the cost and delay involved in obtaining consents and so forth, and in implementing those consents.

Justice Brian Preston: The quality of the decisions.

The Chair: These statistics might not be comparable because, as Lord Mawson said right at the beginning, Australia is geographically different from the UK. New South Wales is different, maybe less so in Sydney and the urban areas. Could we get any information from you later about the speed and cost of obtaining consent in New South Wales for housing developments, infrastructure projects and so on? That fits in with Lord Best's question. What are the downsides and, also, what are the outcomes of the whole thing?

Justice Brian Preston: Let me quickly recap the advantages—because I need to set that up to see the disadvantages—and what we can do and then I will identify what we cannot.

I have already talked about the rationalisation—the one-stop shop. That reduces transaction costs. That is important. Transaction costs are different from other types of costs. There is a cost associated with shopping around different places. By putting it in one place, you get an efficiency. That is important.

Also, because you have a court that knows what it is doing and knows the types of disputes, we can push it through the system quicker. We know how to deal with it and we have tried that. We have a bespoke method. We have all those classes of jurisdiction but each is different. We have differential case management and we have practice notes that deal with the different types of dispute. Therefore, we work out how we can push that one through, which is different from how we can push this one through. A land compensation matter or a compulsory acquisition matter will be different from a planning dispute or a mining dispute. We have a bespoke case management system for each of those types. We understand the problems and respond appropriately to them and we can, therefore, increase the speed.

In our practice notes, we have a template litigation plan. Where should you be at any particular point in time? We have timetables for resolution. You have to have some goal. When will we get there? For certain types of things—the more trivial matters such as the trees and hedge disputes—it takes three months from beginning to end. That is our timetable to run it through. The Government said small-scale residential disputes should be able to move through the system quickly. We created a fast track for that and we have a bespoke system for those types of disputes. We move them through quickly. They go straight to conciliation and they are over in a matter of months. You can tailor it for that particular way. That rationalisation, by putting it all in one place, allows this expertise.

We also get consistency, which is important in the planning and environmental space because consistency builds predictability. Developers need to know what is likely to happen and when. They can build any cost into their project but delay, unpredictability and not knowing what will happen is what kills them. Consistency and speed in decision-making mean that they can build these into their system and that is why they like it. They do not always like our decisions, by the way, but they like how we go about it. The specialisation allows us to get those advantages of consistency, predictability and speed.

The other advantage I have talked about is understanding the “hot situations” and “hot law” that I have talked about.

Also, it is a problem-solving court and that is a completely different approach. All courts solve problems but they do not have a problem-solving approach. A specialist court sees a problem and says, “How best can we solve that problem?”

It also improves access to information, public participation and access to justice. That is for all. It is not just for certain people that you were asking about earlier. Do the little people get access? It is important for them. It is important for the developers. It is important for all people and the government as well, the local councils and the elected councillors. They should all be able to come to the court.

Another one is the integration with the planning system. This is critical. I regularly have meetings with the Minister for Planning, the Minister for Local Government and all the Ministers. I have about seven or eight portfolio Ministers because we have such a broad jurisdiction. We regularly have meetings to see how the court fits within the system and whether we are doing what we are meant to be doing to make these various systems work.

Another aspect is that it is a jurisprudence-developing institution. I like to think of the legislation as the skeleton. It gives you the bare bones. But you cannot think of every situation. By making decisions day by day and case by case, you put flesh on that skeleton. We make that planning law work in practice. That is where I have talked about the planning principles and things that we do. We show how it can work in practice. There is a partnership between the judicial branch of government—this court—and the legislature and the executive. We have that.

What are the disadvantages? They are where those things do not quite work. Sometimes we do not have all the jurisdiction that we should. Tort, for example, still goes to another court. We should have tort. But we overcame that by cross-vesting. We have the ability for the Supreme Court—the equivalent of your High Court—to transfer matters from it to us. We can do vice versa, whichever is the appropriate forum for the resolution of the matter. That overcomes the problem about transaction costs. One of the disadvantages is that we are a specialist court and we have only the jurisdiction that is vested in us by statute. We could have

more jurisdiction and that would mean that those advantages I have talked about would be better able to be achieved.

Sometimes resourcing is a disadvantage. At the moment, we are not too bad, but I have been there for 18 years and the court has been going for 43. It has had its ups and downs. If it does not have all of the human resources, for example, we cannot deal with the caseload. When there is a boom and many more applications being lodged, a percentage of those will come to the court. If I do not have enough people, that slows the system down. You may ask what I am worried about, but there was a six-month delay in listing a matter for hearing. That is unacceptable to us. We would like to think that when people first come to the court I can give them a hearing and put it down. The reason was that I ran out of people. There were more cases coming in than I had people available and so I could not allocate it. Sometimes the disadvantage can be resources. We need to think about that.

We need to think about resources not only in human terms—judges, commissioners, mediators—but physical resources. We have run out of space in courtrooms. I have overcome that by using virtual means. By using Microsoft Teams, AVL and so on, I can move people away from having a courtroom. I can do that also by going to the people and by going to the site of the dispute. We use—very Australian—sometimes even beer gardens in pubs to take evidence from people. We think outside the square. If I do not have enough physical resources, we try to pick that up in town halls, council chambers and a variety of different venues. That can be another disadvantage if you do not resource the court well enough.

- Q94 **The Chair:** Outcomes may be something that you are able either to write to us about later or maybe to refer us to someone who can give us the information, but is this resolution process, this judicial process, resulting in faster, cheaper applications than we find here? You would not necessarily know the comparison, but would you be able to give us access to some sort of data that we could use?

Justice Brian Preston: I will certainly make inquiries. I know the department for planning in New South Wales would look at the processing through various local councils. I can try to find that information and get that sent to you.

The Chair: That would be helpful to us.

Justice Brian Preston: As far as our court is concerned, our annual reports are all available on our website. We are quite transparent as to the numbers of cases and the time taken. It is all there. You can have a look at that.

It is always hard, though, to compare to a system you do not have. If you ask whether we are doing better than if we had some different system, I do not know but I suspect we are.

The Chair: How long does it take to build a railway? Lord Mawson, do

you have a quick question?

Lord Mawson: It is about money. In this country, when you observe what goes on in the legal system, it will come into these kinds of disputes and you know that often they will give you 100 complicated and expensive reasons why you cannot do something. The drivers are vested interests, often within the legal system, rather than solutions, cheaper options and so on. It sounds from what you are saying that your approach is far more cost-effective but is that fair and is that true? People like me worry about the cost of these things that people get trapped in. That is why the little person finds it all so difficult because they get a bit overwhelmed by the finance.

Justice Brian Preston: From Dickens' time, cost and delay have been problems in the courts. We are no different. I am conscious of it. We are trying to overcome it. Have we completely? No, we have not, but we try to do the best we can.

How do we overcome that? One way is the institutional arrangement and having people who know about these things and can cut through. If a lawyer comes in and says, "There are 100 problems", we say, "No, there are not. There are only two problems in this list of 100", and we cut straight through on that and say we are not interested in the rest. But you cannot do that if you do not know to do that. That is one aspect. Having that expertise and knowing what we are doing means that we can cut through.

The second way is that we move things through quickly. It would take me another hour to go through all the little ways at every step. As my grandfather used to say when packing to go on an overseas trip, "Worry about the ounces and the pounds will look after themselves". Look after the little things and you will reduce the time moving through the system.

Then we have the bespoke practice notes, where we have timetables. We say, "That is what you are expected to do. These are your milestones. This is where you will be in this particular case", and they are different. For the little cases about tree disputes, you cannot afford to spend a lot of money on them. The first time they come into the court, they get a hearing. There is no second time. They go straight to the hearing. It is on site. I send an arborist out. They do not even need experts. The arborist goes out and looks at it and says, "That tree is about to fall and you should take it down", or, "This hedge is blocking the view. Cut it to here". They take a pole out, draw a line, spray paint it and say, "Cut here". It is that simple. It is coming up with ways to solve it.

It is about having expert conciliation. The majority of matters—at least two-thirds, and in some areas like land evaluation areas an even higher percentage—are resolved through conciliation. That is where all parties agree.

The Chair: I am keen to bring in Lord Carrington of Fulham.

Q95 **Lord Carrington of Fulham:** Thank you. This is fascinating. Thank you very much for this. I have found it very interesting indeed.

I am trying to work out how capable of being replicated in other jurisdictions the New South Wales solution is. Has it been taken up by other states in Australia?

Justice Brian Preston: Every state and territory in Australia will have a model of a planning and environment court. They are different. Ours is the most comprehensive. Particularly in the planning area, it will be replicated. The sort of bespoke approach we are talking about with appropriate dispute resolution is now pretty universally implemented across the other states.

Lord Carrington of Fulham: New South Wales has a heavily built-up part with Sydney, but it is essentially a rural state without too many land pressures in the same way that you get in the UK, particularly in England. Would you see the solution that works in New South Wales, with a different geographical and population profile, working in the UK with what you know about the densities, historic developments and all the rest of it? Could you see your court, obviously with changes, being transplanted into the UK?

Justice Brian Preston: Yes. New South Wales is not that different in the sense that the overwhelming population is east of the Great Dividing Range. It is quite a narrow coastal plain and everyone wants to live next to the coast. All our work comes from urban areas up and down the coast. Very little comes from inland because they have the space. We have the same pressures that you have with that.

Yes, it can be transplanted. It is the elements or integers that you work with. You do not take it holus-bolus and bring it across but that approach that I talked about—the multidoor courthouse approach, having that centralised jurisdiction, the specialisation, how you structure it and how you go about it—is as applicable in England as it is in New South Wales. You can adapt it to your local circumstances but those things that I have talked about can be implemented to a greater or lesser degree. It is a matter for the UK as to how you do it.

The Chair: Thank you. We are grateful for your time. I understand that your stay in Britain is now coming to an end. We wish you a safe and happy return to Australia. Thank you very much. It has been absolutely fascinating.

Justice Brian Preston: Thank you. That is good. I shared with the secretariat a number of articles, book chapters and things about the court. If you want to read further about the system, they are available. I hope that will be useful. I will follow up with you about the statistics and throughput.

The Chair: We are interested, yes. Thank you. With that, we will terminate the recording.